

# Joint ATAF- OECD Practical Workshop on the Negotiation of Tax Treaties

Pretoria, 13 to 17 August 2012

## Tax Treaty Negotiation Techniques

# OVERVIEW

- Typical steps in negotiating a tax treaty
- Tips on research, planning, conduct and management of the process
- Negotiation conduct, tactics and styles



# TYPICAL STEPS IN THE NEGOTIATION OF A TAX CONVENTION

- Ministerial approval to negotiate
- Preliminary contacts, leading to exchange of models and determination of dates for first round of negotiations
- Each country:
  - Analyses economic relations and income flows with the other country
  - Analyses other country's tax system and tax treaties
  - Engages in pre-negotiation consultation with other governmental branches and with private sector

# TYPICAL STEPS (continued)

- **First round of negotiations**
  - may be preceded by a round or rounds of informal discussions
  - an opportunity to dispense with agreed items, obtain information, sell your positions.
  - Building a good working relationship
- **Second round of negotiations**
  - settle unresolved issues
  - close the deal?
- **Draft initialed**
  - a text that is taken back to the respective Government in order to arrange signature



## TYPICAL STEPS (continued)

- Convention has been translated: date and place of signature have been determined
- Convention printed on treaty paper and signed
- Convention approved by parliament of the first country
- Convention approved by parliament of second country; date and place of exchange of instruments of ratification have been determined
- Instruments of ratification have been issued by each country and have been exchanged
- Convention enters into force

# A GOOD TAX CONVENTION

- meets the interests of each side as far as possible
- is acceptable in both states
- works well in practice
- will resist the test of time
- will be effective and efficient
- will improve the relationship between the parties



# TAX TREATY NEGOTIATIONS INVOLVE

- convergence of positions
- meeting needs
- disclosure of information
- an agreement negotiated in good faith that will be honored in that spirit

# REACHING A GOOD AGREEMENT IS USUALLY DEPENDENT ON

- Research
- Planning
- Preparation
- Conduct of Negotiations
- Management of the process



# RESEARCH

- Know their tax system:
  - are there problems that a treaty would correct?
  - are there features that will prevent conclusion of a treaty?
  - focus on aspects particularly relevant
  - talk to your business people who have deals/investments in that country
- Know their treaty policy:
  - review recent and “key” treaties as well as treaties with countries similar to yours
  - how firm is their policy?

# PLANNING

- Within your treaty negotiation work programme (timing and priority)
- Tactic to be adopted
- Make a realistic prediction of the likely outcome of the negotiation:
  - helps prioritise negotiations
  - identifies problem areas and will assist planning around them
  - keeps the team realistic
- Linkages to other issues/treaties - traps and opportunities



# PREPARATION

- authority to negotiate
- technical briefings of team
- comparison of models
- identification of issues
- prepare negotiation notes/brief
- allocation of roles
- logistics
- set up an appropriate environment

# CONDUCT OF NEGOTIATIONS

- Environment (physical and relations)
- Building an appropriate relationship:
  - Be aware of cultural sensitivities
  - Formality has its place
  - Building a good working relationship is highly desirable
  - Informal discussions are invaluable: disclosure of information, reaching agreement, building rapport etc
- A well disciplined team (leader, speaker, listener, tactician, note taker, support)



# CONDUCT OF NEGOTIATIONS

- Clear and concise statements, presentations and responses
- The value of an accurate record
- All contact is part of the negotiation
- Keep an open mind, understand their positions, state your positions clearly, and be positive
- Management of an accurate working draft
- Use of “agreed minutes” at the conclusion of rounds of negotiations



# MANAGEMENT OF THE PROCESS

- Timing
  - when to negotiate
  - delay between rounds
  - closing the deal
- Disciplined and orderly approach
  - keeping the team in line
  - avoid unintended “gaffs” or insults
- Avoiding misunderstanding
  - confirmation of understandings
  - keep the working draft clean, fresh, and accurate
- Getting Government approval



# CONSULTATION AND COMMUNICATION WITH INTERESTED PARTIES

- required with some parties
- optional (but valuable) with others
- all consultation has to be planned and managed carefully.

# USUAL POINTS OF CONTACT

- Minister and Government
  - approval of work programme
  - negotiation instructions?
  - may play a role in resolving deadlocks
  - signature and giving effect under law
- Other Government Departments
  - will depend on the role they play in the negotiations and what they have to offer
  - Foreign Ministry should be involved with certain technical issues (certain drafting issues, definition of countries, territorial claims, formal communications with the other state, preparing the treaty for signature and arranging signature and exchange of notes)



# USUAL POINTS OF CONTACT (continued)

- Business Community
  - a valuable source of information
  - a opportunity to define benefits
  - method varies from country to country
  - what disclosures can be made?
- The Other Country
  - formal and informal contacts

# USUAL POINTS OF CONTACT (continued)

- Between the Negotiation Teams
- With the Public
  - Disclosures during negotiations
  - announcing conclusion of agreement and when?
  - Releasing copy of the treaty



# COMMUNICATIONS

- Progress reports
  - practical arrangements
- Media Release on Signature of Agreement
  - practical arrangements
- Releasing the Text of the Agreement
  - how arranged and timing
  - the internet is useful for this purpose

# Negotiation Process, Tactics and Styles



# KEY THINGS

- Preparation
- Selling and bargaining
- Good communication
- Strategy
- Leverage
- Open mind
- Trust, respect and credibility

# THE CONDUCT OF NEGOTIATIONS

- Whose model is used?
- Order - where to start and how to proceed
- Who leads the discussion
- Maintaining an accurate working draft
  - reading back agreed drafting
  - use of square brackets
- Dealing with linked provisions and issues



# PROCESS OF DISCUSSING AN ITEM

1. Introduce the item (get their attention and start selling)
2. Present your argument(s) – some may be held back
3. Listen to and understand their response
4. Be prepared to counter
5. Way forward? – don't be put off if they do not accept your brilliant argument straight away, their response may be linked to other issues
6. Close a deal before it is lost or before they change their mind

# ARGUMENTS: WE WANT THIS BECAUSE...

- Common arguments why your position is preferred:
  - The policy/logic argument
  - Precedent
  - Anti – abuse
  - Not effective
  - Revenue
  - Firm policy



# Policy/logic argument

- Plays on reason and sound policy
- Often based on economic arguments
- Can be based on mutual benefit (we will both benefit because ...)

# Precedent

- Many strands
- Reference to UN or OECD Models to enhance credibility of your position
- Reference to other treaties for:
  - credibility
  - to show they have given it to others (why not to us?)
  - widely accepted (we got it in our last 6 treaties)
  - competition – if you give a competitor country a better rate, our businesses will be disadvantaged



# Anti-abuse

- Provision needed to prevent abuse
- Being ripped off by taxpayers is not in the interest of either country
- Reminder that the other party to the treaty is the taxpayer
- Use of examples to illustrate
- Keep an open mind and don't be afraid to consider alternative solutions

# Not effective

- It won't work
- Use examples to illustrate
- Need an understanding of what the parties are seeking to achieve



# Revenue

- We want the cash!
- May be linked to:
  - economic arguments
  - anti-avoidance arguments
  - precedent arguments
- Taxation under domestic law vs. under the proposed treaty

# Firm Policy

- How firm is the policy?
- Some issues are non-negotiable
- May be part of signaling/bargaining strategy
- Policies are easily read from models and the outcome of other negotiations



# POINTERS (1)

1. Know the value of what you are trading:
  - Extract a high price for a valuable item
  - Something they want desperately, but is not worth much to you, should be played carefully and exchanged for something valuable
  - Tied to how you disclose information
  - Talk up its value
2. Disclosure
  - Information is power, use it wisely
  - Poor disclosure or signals can be harmful
  - Ways of indicating a path forward without committing before other parts of the deal are discussed – describing a possible way forward



## POINTERS (2)

3. Eliminate the negative and accentuate the positive
4. Try to understand their point of view – needs analysis and problem solving
5. Don't be upset or surprised if they don't accept your brilliant arguments:
  - it may be part of a package strategy
  - they may be inexperienced
  - make sure they understood your argument
  - Move on and come back



# THE SOFT AND AGGRESSIVE STYLES

## Soft Negotiator

- negotiators are friends
- objective: agree asap
- makes concessions to improve relationship
- soft on people
- trusts other side
- easily changes his/her mind
- makes offers
- discloses bottom line
- accepts one-sided losses
- searches for what other side will accept
- insists on agreement
- avoids conflict
- yields to pressure

## Aggressive negotiator

- negotiators are adversaries
- objective: to win over the other side
- demands concessions
- hard on people
- distrusts other side
- digs in on positions
- makes threats
- misleads as to his/her bottom line
- demands one-sided gains
- goes after what he/she wants
- insists on positions
- tries to win conflicts
- applies pressure



# RECOGNISING TACTICS CAN NEUTRALISE THEM (1)

- Misrepresentation of the facts
  - risky (facts can be verified, may lose trust and credibility)
  - knowledge and preparation makes it difficult
  - challenge the fact, not the person
  - *but*, there is no duty to make a full disclosure
- Referring to superiors
  - can be genuine or a tactic (buys time)
  - insist on reciprocity
  - link the item to the rest of the DTC



# RECOGNISING TACTICS CAN NEUTRALISE THEM (2)

- Not negotiable!
  - can be genuine or a tactic
  - do not make an issue of it; ignore it
  - look for alternatives
- making unreasonable demands
  - undermines credibility
  - respond with bargaining approach
  - make it obvious: ask for justification or compare with other DTC's
- reopening negotiations on settled points
  - can be genuine and necessary
  - adopt problem solving approach
  - insist on reciprocity

# RECOGNISING TACTICS CAN NEUTRALISE THEM (3)

- putting pressure
  - acting angry is difficult and dangerous
  - redirect personal attacks to the problem
  - do not interrupt; do not react in kind
- using silence
  - people feel uncomfortable with silence
  - can be a tactic when someone has a weak position
  - recognise it; remain silent yourself



# THE PROBLEM SOLVING APPROACH

- negotiators are problem solvers
- *objective*: a good DTC reached efficiently and amicably
- separates the people from the problem
- soft on the people, hard on the problem
- proceeds independently of issue of trust
- focuses on interests, not on positions
- explores interests
- avoids having a bottom line
- invents options for mutual gains
- develops multiple options, leaving decision on choice for later
- insists on using objective criteria
- tries to reach a result based on standards independent of will
- reasons and is open to reason: yields to arguments of principle, not to pressure



# STRATEGIES TO ASSIST IN PROBLEM SOLVING

- (1) Clearly present your proposals, submissions and responses
- (2) Keep the discussions structured and orderly
- (3) Make use of examples
  - as often as appropriate
  - to explain a problem or solution
- (4) Ask questions:
  - to obtain information
  - to draw attention
  - to give information
  - to force the other side to think
  - to help the other side to reach conclusions



# STRATEGIES TO ASSIST IN PROBLEM SOLVING

## (5) use drafts

- negotiate on the basis of drafts
- prepare them in advance
- look for precedents
- do not present as final; invite criticism

## (6) seek short adjournments

- take and allow time to study drafts, review tactics and progress

## (7) avoid insults - good relations are helpful

# NEGOTIATION DOS AND DON'T

- List others:

**Dos**

**Don'ts**